FOR PUBLICATION

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

KEITH A. WAIBEL, as Trustee for Junior Larry Hillbroom Trust, MARCIANO IMEONG, and NAOKO IMEONG,
Plaintiffs,

v.

MYRON A. FARBER, JOHN FRANCIS PERKIN, and BRUCE L. JORGENSEN,
Defendants,

JOHN FRANCIS PERKIN,
Third-Party Plaintiff and Counterclaim Defendant,

v.

DAVID J. LUJAN,
Third-Party Defendant and Counterclaim Plaintiff,

DAVID J. LUJAN,
Fourth-Party Plaintiff/Appellant,

v.

THE ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Fourth-Party Defendant/Appellee.

Appeal Nos. 04-0007-GA & 04-0009-GA (Cons.)
Civil Action No. 01-0236D

OPINION

Cite as: Waibel v. Farber, 2006 MP 15

Argued and submitted on November 19, 2004
Saipan, Northern Mariana Islands

Attorney for Appellant:	Attorney for Appellant:	Attorney for Appellee:
Edward C. Arriola	Stephanie G. Flores	Vicente T. Salas
P.O. Box 501788	P.O. Box 501856	P.O. Box 501309
Saipan, MP 96950	Saipan, MP 96950	Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; TIMOTHY H. BELLAS, *Justice Pro Tempore*; F. PHILIP CARBULLIDO, *Justice Pro Tempore*

DEMAPAN, Chief Justice:

¶1 David J. Lujan sued The Saint Paul Fire & Marine Insurance Company (in a fourth party complaint) and John Francis Perkin (by way of counterclaim) for wrongful use of civil proceedings. The Superior Court dismissed both claims for failure to state a claim; in one case for untimely filing, in the other for failure to establish the prima facie case. For the reasons set forth below, we AFFIRM.

I.

¶2 Before this Court is another in a long line of cases stemming from the Larry Hillblom Estate. This case is unique, however, in that the current action is not a clear offspring of the Estate's settlement, but a progeny somewhat hidden from the underlying litigation. Appellant, David Lujan, represented alleged pretermitted child, Junior Larry Hillbroom, in the prosecution of his claim on the Hillblom Estate. Lujan, in turn, enlisted the help of Myron Farber, a former

New York Times reporter, to help uncover the facts surrounding the alleged parentage. The exact terms of Lujan and Farber's agreement are uncertain, indeed they are the subject of much of the present litigation, but one fact is clear; Farber was promised a large sum of money for his assistance in the case.

¶3 After working on the case for over a year, Farber became worried that he would not get paid. Although he was assured by Lujan as well as Lujan's clients, the trustee's of the Junior Larry Hillbroom Trust, that he would be paid in full, Farber retained the services of John Perkin, a Hawaii attorney, to help secure payment. After some communications between counsels, Farber filed suit in federal court against Lujan and the trustees. The federal court issued a temporary restraining order enjoining the distribution of the Hillblom Estate into the Trust, but the injunction was lifted after Lujan agreed to pay $400,000 to the court for the benefit of Farber. Shortly thereafter, Farber moved to dismiss his remaining claims and on November 13, 2000 the court granted the dismissal.

¶4 Thereafter, the trustees of the Junior Larry Hillbroom Trust sued Farber and his attorneys for wrongful use of civil process. Lujan was not involved in this case at the outset, but he was later made a party when Perkin initiated a third-party complaint against him for indemnification and contribution. Perkin reasoned that if he was held liable to the Trust, Lujan's refusal to be forthcoming in paying Farber was the reason. Lujan answered Perkin's third-party complaint and subsequently moved to file an amended answer to assert a counterclaim and fourth-party complaint. The trial court granted Lujan's motion to amend, and Lujan later filed a fourth-party claim against St. Paul Fire & Marine Insurance Company (the malpractice insurer for Perkin) and a counterclaim against Perkin for actual damages incurred from Perkin's pursuit of Farber's claim against him for payment.

¶5 Both of Lujan's claims were ultimately dismissed under the Commonwealth Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Lujan appealed these two dismissals separately, but we now consolidate the appeals and address them here together.

¶6 As to Lujan's fourth-party complaint, we hold that the Superior Court did not have personal jurisdiction over St. Paul. As to Lujan's counterclaim, we hold that the Superior Court did not err in finding that Perkin had probable cause in commencing the original suit against Lujan to secure Farber's payment. For the reasons described herein, we AFFIRM the Superior Court's dismissal of both Lujan's fourth-party complaint and counterclaim.

II.

¶7 This Court has jurisdiction to hear appeals of final judgments entered by the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code.

III.

¶8 Lujan appeals the Superior Court's decision to 1) dismiss his claim against St. Paul for expiration of the statutory time to file; and 2) dismiss his claim against Perkin for failure to state a claim upon which relief can be granted. These issues are addressed in turn.

A. Lack of personal jurisdiction over St. Paul

¶9 Lujan filed his fourth-party complaint against St. Paul on November 15, 2002. St. Paul then filed a motion to dismiss Lujan's complaint based on Comm. R. Civ. P 12(b)(2) and 12(b)(6); for lack of jurisdiction over the person and for failure to state a claim upon which relief

can be granted respectively. The Superior Court held that it did have personal jurisdiction over St. Paul but that Lujan's action failed to state a claim upon which relief could be granted because the action was barred by the statute of limitations.

¶10 Personal jurisdiction is a necessary prerequisite to reaching the merits of any case. Although it can be waived by the defendant, Comm. R. Civ. P. 12(h)(1), when properly asserted as a defense, the court must examine the legitimacy of jurisdiction prior to continuing. Here, St. Paul moved for summary judgment based in part on a Comm. R. Civ. P 12(b)(2) claim of no personal jurisdiction, but the Superior Court found jurisdiction to exist. On appeal, St. Paul argues that the lower court was right to dismiss for failure to state a claim, but that the lower court erred when if found personal jurisdiction to exist. Although St. Paul's response brief reiterates its argument against personal jurisdiction, it did not cross-appeal the lower court's finding of this issue.

¶11 Generally, this Court will not address an issue unless one of the parties directly appeals it. However, this rule is not without exception. We may uphold a lower court's ruling upon any evidence in the record regardless whether that issue was properly appealed, except in so doing we will not enlarge the rights of a non-appealing party. The U.S. Supreme Court has long recognized this exception:

> [Absent a cross-appeal] the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an instance upon matter overlooked or ignored by it.

U.S. v. American Ry. Express, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 (1924). *See also Matter of Appointment of Independent Counsel*, 766 F.2d 70 (2nd Cir. 1985). Affirming the

lower court's decision to dismiss Lujan's claim based on a lack of personal jurisdiction will not enlarge St. Paul's rights beyond affirming based on failure to state a claim. Thus, since it has no bearing on the rights or obligations of either party, we may affirm the lower court's decision based on a lack of personal jurisdiction without it being brought up on cross-appeal.

¶12 The plaintiff has the burden of establishing personal jurisdiction. *Farmers Ins. Exchange v. Portage La Prarie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990); *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986); *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). "When a [trial] court rules on a … motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, as in this case, the plaintiff need make only a prima facie showing of personal jurisdiction to defeat the motion." *OMI Holdings, Inc.*, 149 F. 3d at 1091; *see also Travelers Indem. Co.*, 798 F. 2d at 831. We review the trial court's decision *de novo* to determine if the plaintiff has met this burden. *Farmers Ins. Exchange*, 907 F. 2d at 912.

¶13 St. Paul's claim that the lower court was without personal jurisdiction is premised on two related, yet distinct, arguments. First, St. Paul maintains that the Commonwealth's long-arm statute, by its own terms, fails to reach St. Paul. Second, St. Paul argues that even if the Commonwealth's long-arm statue were sufficient to grant personal jurisdiction, an exercise of jurisdiction in this case is precluded by a lack of contacts with the Commonwealth. St. Paul's argument highlights the two main facets necessary for a finding of personal jurisdiction over out of state parties. As this Court has noted, personal jurisdiction over a party outside a forum's borders is governed by the forum's long-arm statute, which is in turn bounded by due process considerations. *Bank of Saipan v. Superior Court (Attorney's Liability Society, Inc.)*, 2001 MP 5 ¶ 34. The CNMI long-arm statute reaches as far as the federal law allows, 7 CMC § 1102(e)

(The "[CNMI] legislature intends that jurisdiction under [this forum's long-arm statute] be coextensive with the minimum standards of due process as determined in the United States federal courts"), so the discussion here will focus mainly on the requirements of due process.

¶14 Before addressing St. Paul's contacts with the Commonwealth, however, it should be noted that at the time Lujan initiated his action against St. Paul, the CNMI's direct action statute specifically provided for such claims:

> On any policy of liability insurance the insured person or his or her heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in the Commonwealth, and whether or not the policy contains a provision forbidding the direct action; provided, that the cause of action arose in the Commonwealth. The action may be brought against the insurer alone, or against both the insured and insurer.

4 CMC§ 7502(e).[1] Although our (previous) direct action statute seems to provide Lujan authority to sue St. Paul in its capacity as Perkin's liability insurer, that statute does not alter our approach here. Just as the contours of our long-arm statute are defined by the requirements of due process, so our direct action statute is similarly bound.

¶15 This court has noted that "[d]ue process requirements are satisfied when in personam jurisdiction is asserted over the non-resident defendant who possesses minimum contacts with the forum such that the exercise of personal jurisdiction does not 'offend traditional notions of fair play and substantial justice.'" *Bank of Saipan*, 2001 MP 5 ¶ 40 (citation omitted). An essential element of due process is the notion of fairness, which requires the defendant have, by her own actions, created the connections by which jurisdiction is found. Foreseeability is central, but "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct

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[1] The direct action statute was amended by P.L. 14-39, effective 10-26-04 to require that the Plaintiff make a showing that the insured can not be served before the insurer can be sued directly.

and connection with the forum State are such that he should *reasonably anticipate* being hauled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980) (emphasis added). It is the purposeful actions of the defendant, along with the intended or reasonably anticipated consequences of those actions, which create forseeability of litigation within a forum. Idiosyncratic actors, or isolated actions are insufficient. *Burger King Corp. v. Rudzewick*, 471 U.S. 462, 475, 105 S.Ct. 2147, 2183, 85 L.Ed.2d 528 (1985). With this in mind we analyze St. Paul's contacts with the Commonwealth.

1. No General Jurisdiction over St. Paul

¶16 General jurisdiction over a party allows it to be hauled into court regardless of whether the circumstances giving rise to the cause of action are related to the party's connections with the forum. *Bank of Saipan*, 2001 MP 5 ¶ 41. "The standard for establishing general jurisdiction is 'fairly high.'" *Id.* (citation omitted). The hallmark of general jurisdiction involves engaging in and maintaining regular systematic relations with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984). Here there is a lack of purposeful and continuous business in the Commonwealth, as evidenced by the fact that St. Paul's only alleged connection with the Commonwealth arose from the single liability policy it issued Perkin. This makes clear that no general jurisdiction exists over St. Paul.

2. No Specific Jurisdiction over St. Paul

¶17 A court enjoys specific jurisdiction over a foreign defendant when the circumstances giving rise to the cause of action are a product of, or closely related to, the defendant's contacts with the forum. *Bank of Saipan*, 2001 MP 5 ¶ 42. Specific jurisdiction, which is more limited in scope than general jurisdiction, helps a forum protect its "manifest interest in providing effective

means of redress for its residents" when the action arises through the defendants purposeful conduct within a forum. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957). This court has held that specific jurisdiction is established by demonstrating: (1) through purposeful actions the defendant has established adequate contacts with the Commonwealth so as to reasonably expect being hauled into court here; (2) the action arose through these contacts; and (3) jurisdiction is otherwise reasonable. *Bank of Saipan*, 2001 MP 5 ¶ 42. Since we find herein that personal jurisdiction over St. Paul fails for lack of sufficient contacts, we need not address prongs two and three of this test.

¶18 As with personal jurisdiction generally, specific jurisdiction is predicated on notions of fairness, predictability, and foreseeability to would-be defendants. This requirement, commonly referred to as "purposeful availment," ensures that the defendant will not be hauled into court based on the "unilateral activity of another party or third person," or even based on the defendant's own actions if only "'random,' 'fortuitous,' or 'attenuated.'" *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2183 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 1873 80 L.Ed.2d 404 (1984), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478 79 L.Ed.2d 790 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 299, 100 S.Ct. at 568. In short, "the due process requirement is met if a defendant has 'fair warning that a particular activity may subject [them] to the jurisdiction of a sovereign,'" *Bank of Saipan*, 2001 MP 5 ¶ 43 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S. Ct. 2569, 2587, 53 L.Ed..2d 683 (1977) (Stephens, J. concurring).

¶19 Here, the Superior Court's exercise of specific in personam jurisdiction over St. Paul offended due process because there is no evidence that St. Paul had purposefully availed itself of the privilege of conducting activities in the Commonwealth. Lujan has the burden of

establishing specific personal jurisdiction over St. Paul. *See infra* ¶12. However, Lujan fails to submit any evidence to show the requisite minimum contacts between St. Paul and the Commonwealth. The only evidence submitted on the issue is an uncontroverted affidavit of St. Paul's Corporate Secretary stating: (1) St. Paul is an insurance company which provides insurance in the United States, including the State of Hawaii, but not the CNMI; (2) From September 1, 2000, to September 1, 2002, St. Paul maintained a professional liability insurance policy for Perkin, but at all times within which Perkin was covered by St. Paul, St. Paul understood Perkin to be a resident and citizen of Hawaii with his principal and primary place of work in Hawaii; (3) the insurance policy was issued to and covered a Hawaii resident attorney; (4) St. Paul does not insure attorneys residing and practicing in the CNMI, nor does it solicit or accept applications from such attorneys; (5) St. Paul does not have an office in the CNMI; (6) St. Paul does not have an agent in the CNMI; and (7) St. Paul does not sell insurance or any product or service in the CNMI. (Appellee's Excerpts of Record at 39-40.)

¶20 There is no evidence that Perkin's insurance policy contained a territory of coverage clause including the CNMI,[2] and St. Paul does not admit coverage. Nor has St. Paul previously been a defendant in the CNMI, which would have put them on notice of the possibility of being hauled into court here again. Nothing in the record, therefore, leads us to find that St. Paul had purposefully availed itself of the privilege of conducting business in the Commonwealth. The

[2] The question of whether a foreign insurer establishes minimum contacts with a forum by selling an insurance policy with a territory of coverage clause which includes the forum has been heavily litigated in a number of state courts without reaching a consensus. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1092 (10th Cir. 1998). For example, a New Jersey court has held that a contractual commitment by a nonresident insurance company to defend its insured against claims arising out of accidents occurring in New Jersey, constitutes sufficient contact with New Jersey to subject the insurer to suit there if its insured has an accident there and that accident generates third party claims. *New Jersey Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins. Co.*, 600 A.2d 1243, 1245 (N.J. Super. Ct. 1991). On the other hand, in *Batton v. Tennessee Farmer Farmers Mut. Ins. Co.*, 153 Ariz. 268, 272 (1987), the court held that even the extension of nationwide coverage by an insurer does not automatically make state jurisdiction over foreign defendants permissible. We need not resolve this question at this time since there was no evidence that the insurance policy in this case contained such a clause.

sole question is whether the insurer St. Paul purposefully directed its activities at the CNMI, and based on the facts of the present case, it is not possible to say that it has done so.

¶21 We conclude that the Superior Court's exercise of personal jurisdiction over St. Paul deprived St. Paul of its constitutional rights to due process. Having concluded as such, we need not address the merits of the issues on appeal that are related to the dismissal of Lujan's fourth-party complaint against St. Paul.

B. Dismissal of Lujan's counterclaim against Perkin was proper because probable cause existed as a matter of law.

¶22 Summary judgments are appropriate where the record indicates that no genuine issue of material fact exists. Comm. R. Civ. P. 56(c). In making this determination, the evidence is viewed in a light most favorable to the non-moving party. *Santos v. Santos*, 4 N.M.I. 206, 209 (1994). The burden falls initially on the moving party to demonstrate the absence of a genuine issue of material fact. *Eurotex, Inc. v. Muna*, 4 N.M.I. 280, 283 (1995). Once the moving party has satisfied the court in this respect, the burden shifts to the non-moving party to show specific evidence which demonstrates the existence of a genuine issue of material fact. *Id*. We review summary judgment orders *de novo*. *Santos*, 4 N.M.I., at 209.

¶23 The threshold question for determining a genuine issue of material fact is whether, based on the evidence before the court, a reasonable jury might find for the non-moving party. *Eurotex*, 4 N.M.I. at 283-84. It is not the jury's decision, however, whether a genuine issue of material fact exists. It is the jury's place to decide disputed facts, but this authority does not vest simply by one party filing a complaint. Rather, legal sufficiency of the evidence is within the province of the court, and Comm. R. Civ. P. 56 empowers the court to filter out meritless claims.

¶24 Lujan's counterclaim against Perkin was based on wrongful use of civil proceedings. Many courts have noted that since the tort of wrongful use of civil proceedings (and its siblings, malicious prosecution and abuse of process) are likely to have a chilling effect on an individual's choice to seek judicial recourse, the law disfavors these causes of action and must approach them with caution. *See Anderson Development Co. v. Tobias*, 116 P.3d 323, 339 (Utah, 2005) ("We acknowledge, however, as have other jurisdictions, that these torts have 'the potential to impose an undue "chilling effect" on the ordinary citizen's willingness to … bring a civil dispute to court, and, as a consequence, the tort[s] ha[ve] traditionally been regarded as … disfavored causes of action.'" (citation omitted); *Mitchell v. Folmar & Associates, LLP.*, 854 So.2d 1115, 1117, (Ala. 2003) ("Malicious prosecution is an action disfavored in the law … The reason for such disfavor is clear: [P]ublic policy requires that all persons shall resort freely to the courts for redress of wrongs and to enforce their rights, and that this may be done without the peril of a suit for damages in the event of an unfavorable judgment by jury or judge.") (citation omitted); *Butera v. Boucher*, 798 A.2d 340, 354 (Rhode Island, 2002) ([T]his Court has viewed abuse-of-process actions with disfavor because they tend to deter the prosecution of crimes and/or to chill free access to the courts.") (citation omitted); *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 502 (Cal. 1989) (pointing out that "[i]n a number of other states, the disfavored status of the tort is reflected in a requirement that a plaintiff demonstrate a 'special injury' beyond that ordinarily incurred in defending a lawsuit in order to prevail in a malicious prosecution action." (*citing O'Toole v. Franklin*, 569 P.2d 561, 564 fn. 3 (Or. 1977) as listing 17 states with the special-injury requirement.)) Despite its unsavory character, however, an action for wrongful use of civil proceedings lies as both a deterrent to overzealous litigators[3] as well as a means of

[3] It is unlikely, however, that additional opportunities for litigation create the most effective or efficient means of deterring unfounded litigation. As the Supreme Court of California notes in *Sheldon Appel*, 569 P.2d at 503:

redress for a defendant who was wrongfully dragged through the judicial system. This court has previously recognized the action for wrongful use of civil proceedings, *Mitchell v. Estate of Hillblom*, 5 N.M.I. 136 ¶ 10 (1997), and we continue to do so here, adding only that the important policy issues surrounding this tort require us to approach it cautiously. We recognize, like the Supreme Court of New Mexico, that "we must construe [this tort] narrowly in order to protect the right of access to the courts." *DeVaney v. Thriftway Marketing Corp.*, 124 N.M. 512, 519, 953 P.2d 277, 284 (1997).

¶25 Lujan counterclaimed against Perkin based on wrongful use of civil proceedings seeking actual damages sustained in defending Perkin's suit against him to recover Farber's payment. Perkin then moved for summary judgment for failure to state a claim. To make his prima facie case, Lujan would need to prove that (1) Perkin actively participated in initiating, continuing, or procuring the civil action against him; (2) Perkin did not have probable cause to do so; (3) Perkin was acting principally out of interests other than securing proper adjudication of the claim in which the proceedings are based; and (4) the proceedings were terminated in favor of Lujan. *Mitchell v. Estate of Hillblom*, 5 NMI 136 ¶10. Thus, in order to defeat Perkin's request for summary judgment, Lujan needed to demonstrate that a genuine issue of material fact exists as to each element not clearly established. The Superior Court found that (1) Perkin had probable cause and that (2) Lujan could not prove Perkin acted out of any desire other than to secure

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> While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded.

A similar type of reasoning – preferring sanctions to additional litigation – can be found in the United States Supreme Court's opinion in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 553, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991); "without merit is [the] argument that [Federal Rule of Civil Procedure 11] creates a federal common law of malicious prosecution … The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses." (citations omitted).

proper adjudication of his client's claims. We affirm the lower court's decision that Perkin had probable cause, and therefore Lujan's claim fails as a matter of law and we need not address Perkin's motive for adjudication.

¶26 In determining what amounts to 'probable cause,' we must be mindful of the policy concerns surrounding the tort of wrongful use of civil process; namely the deterrent effect a stringent standard would impose upon those in need of judicial recourse. These concerns are heightened here, however, because the defendant is an attorney being sued for actions he took on behalf of his client. The standard we set must take into consideration an attorney's duty as an advocate, to zealously present her client's case, and not that of a judge, whose job it is to weigh the merits of that claim and determine its validity. Other courts have recognized the same. *See Wong v. Tabor*, 422 N.E.2d 1279, 1285-86 (Ind. App. 1981) ("[W]e must be ever mindful that an attorney's role is to facilitate access to our judicial system for any person seeking legal relief…. We thus emphasize that any standard of probable cause must insure that the attorney's 'duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit' is preserved.") (citation omitted). To assure adequate access by the public, attorneys must be given broad leeway in their pursuit of their client's interests. *See e.g. Zamos v. Stroud*, 87 P.3d 802, 810 (Cal. 2004) ("Only those actions that any reasonable attorney would agree are *totally and completely without merit* may form the basis for a malicious prosecution suit.") (citation omitted) (emphasis added).

¶27 The major problem in articulating a probable cause standard would seem to lie in the objective standard/subjective belief dichotomy. This problem is made clear in the often quoted dicta in *Tool Research and Engineering Corp. v. Henigson*, 46 Cal. App.3d 675, 683 (1975) which states:

> An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried. … The *attorney must entertain a subjective belief* in that the claim merits litigation and *that belief must satisfy an objective standard*. (citation omitted) (emphasis added).

This focus on the attorney's subjective belief led courts to grapple both with the degree of belief and with how to prove the attorney possessed that belief. *See e.g. Sheldon Appel*, 765 P.2d at 505-09. This was made more problematic because the question of whether the alleged facts amount to probable cause is one for the court, whereas the question of whether the alleged facts were *known* and *believed* by the defendant is one for the jury. *Id*. at 503. In a typical scenario, a judge would find that the alleged facts amounted to probable cause – thus the wrongful prosecution claim should fail as a matter of law – but the judge could not dispose of the case because a jury would need to hear the disputed evidence to determine whether the defendant knew and believed those alleged facts. *Id*. at 506. As the California Supreme Court found:

> [B]ecause the issue of the attorney's subjective belief or nonbelief in legal tenability would rarely be susceptible of clear proof and, when controverted, would always pose a factual question, the [*Tool Research*] dictum would in many cases effectively leave the ultimate resolution of the probable cause element to the jury, rather than to the court.

Id.

¶28 For this reason the California Supreme Court overruled *Tool Research* to the extent it required a showing of the attorney's subjective belief in the tenability of the claim to demonstrate probable cause. *Id*. We agree. The correct standard is whether the court believes the alleged facts amount to probable cause. *Director General of Railroads v. Kastenbaum*, 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146 (1923) ("[T]he standard applied to defendant's consciousness is external to it. The question is not whether he thought the facts to constitute

probable cause, but whether the court thinks they did.") (citing HOLMES ON THE COMMON LAW, 140.) Any dispute as to what the facts actually were is a matter for the jury, but if any undisputed facts tend to demonstrate probable cause, the inquiry stops there.

¶29 It should be noted that another reason weighs in favor of a simple objective test. Attorneys have the ability, and in some instances the responsibility, to seek changes in laws they feel to be unjust, or unjustly applied. It would be unwise for this court to inhibit that process by announcing a probable cause standard that mandates that an attorney must believe that his case is likely to be won, or even rise to the level of near certainty of success. If we were to hold "that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law." *Wong*, 422 N.E.2d at 1288.

¶30 Turning to the case at bar, the record clearly shows the existence of probable cause. The record contains a letter dated September 29, 1998 from Farber to Lujan evidencing an agreement where Lujan had promised to pay Farber for his services upon distribution of the Hillblom Estate. This letter was signed by Lujan as "agreed to." After communications between Farber and Lujan had allegedly ceased, Perkin was retained by Farber to help him secure payment from Lujan. Perkin wrote Lujan a letter requesting assurance that Farber would be paid at the time of distribution of the estate, as stated in the September 29, 1998 letter. Lujan's reply said that Farber would be paid, but only after the occurrence of certain events which were not included in that September 29, 1998 letter. Viewed objectively, the inclusion of these new terms *might* amount to anticipatory repudiation.[4] Thus, Perkin had probable cause as a matter of law to file

[4] *See* RESTATEMENT (SECOND) OF TORTS § 250 cmt. d.

> But where a party wrongfully states that he will not perform at all unless the other party consents to a modification of his contract rights, the statement is a repudiation even though the concession

the action unless Lujan presented evidence tending to show that the facts just stated did not occur. Specifically, Lujan would have had to show that the September 29, 1998 letter was fraudulent, or that his reply letter to Perkin could not reasonably be understood as an attempt to modify his agreement with Farber or as inadequate assurance that he would fulfill his contractual obligations. Lujan presented no evidence to that effect. Rather, Lujan argued that Perkin never believed that Farber would go unpaid, and a reasonable jury could find that Perkin's filing the claim was unnecessary and malicious. In essence, Lujan asks this court hold that when a reasonable jury could find that a party initiated a lawsuit for an improper purpose, the court should reserve the question of probable cause until the jury has had a chance to assess the defendant's motive. For the reasons stated above, we refuse to follow this course. Although malice may be inferred from a lack of probable cause, *a lack of probable cause may not be inferred from malice*. The jury's only role in probable cause analysis is to resolve disputed facts upon which the objective analysis of the court operates. Of course if the defendant's mental state is a disputed fact bearing directly on the probable cause analysis, such as whether the defendant knew some exculpatory evidence prior to filing suit in the underlying case, then a jury will need to address it.[5] But once the relevant underlying facts are settled, the court utilizes an objective approach and does not consider how either party might have subjectively viewed the facts. Here, the facts clearly demonstrate that Perkin had probable cause to file suit against Lujan to assure Farber was paid.

> that he seeks is a minor one, because the breach that he threatens in order to exact it is a complete refusal of performance;

and § 251(2), "The oblige may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case."

[5] It is worth noting that Lujan raised a colorable argument as to whether Perkin knew some pertinent facts prior to deciding to file. Specifically, Lujan argues that Farber's affidavit, which Perkin claims as his source of information regarding the case, was not clearly signed before initiating the case. Since no year appears on the date line, a jury might be persuaded that the affidavit was signed and presented to Perkin after his decision to file. This might persuade the court that a genuine issue of material fact as to probable cause did exist if not for the other evidence in the record which we believe clearly shows Perkin had probable cause.

IV.

¶31 For the above reasons, the Superior Court's dismissal of Lujan's action against St. Paul and its award of summary judgment to Perkin is AFFIRMED.

¶ 32 DATED this 27th day of June, 2006.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN
Chief Justice

/s/ F. Philip Carbullido
F. PHILIP CARBULLIDO
Justice *Pro Tempore*

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS
Justice *Pro Tempore*